

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-41057

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067,
77-4068, 77-4073,
77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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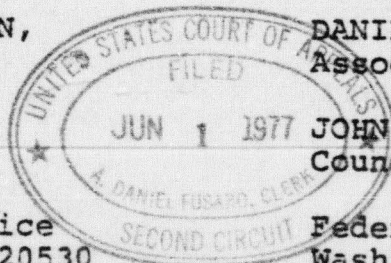


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BRIEF FOR RESPONDENTS

Six petitioners seek review of a Federal Communications Commission order which requires interstate telephone and telegraph companies to remove restrictions from their tariffs forbidding the "resale" and "shared use" of private line communications services and facilities.

The Commission found the restrictions and limitations to be unjust, unreasonable and unduly discriminatory, in violation of the Communications Act. On a further finding that unlimited "resale" and "shared use" of private line services would result in specific enumerated public interest benefits, the Commission prescribed a tariff regulation for the telephone and telegraph companies which permits unlimited sharing and resale of private line services and facilities. Finally, the Commission determined that parties engaged in resale of private line services are communications common carriers subject to regulation under the common carrier provisions of the Communications Act; true sharing arrangements, by contrast, will not be regulated as common carriage but will be subject to Commission scrutiny to ensure that de facto common carriage does not evade appropriate regulation under the guise of sharing.

The Commission's decision is reported as Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities (Docket No. 20097), 60 FCC 2d 261 (1976) (J.A. 28), 62 FCC 2d 588 (1977) (J.A. 152). This Court has jurisdiction by virtue of 47 U.S.C. §402(a) and 28 U.S.C. §2342(1), and venue by virtue of 28 U.S.C. §2343.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Commission observed the procedure required by law in adopting a prospective policy governing resale and shared use of private line services, applicable to the entire industry and implemented by prescription of tariff provisions for the future, through general rulemaking open to all interested parties.

2. Whether the Commission acted arbitrarily, capriciously, contrary to law, or beyond its authority in determining (a) that resellers of communications services are common carriers subject to regulation under Title II of the Communications Act, because they undertake for hire to serve the public indiscriminately, and (b) that true sharing does not constitute common carriage subject to Title II regulation, because it does not involve an undertaking for hire to serve the public indiscriminately.

3. Whether the Commission acted within its discretion in adopting a regulatory scheme for resale that (a) permits "open entry" into the market on a limited showing

of technical and financial qualification, (b) requires prior authorization for any termination that will result in actual impairment of service to the public, and (c) limits scrutiny of rates to case-by-case investigation as particular problems arise.

COUNTERSTATEMENT OF THE CASE

This case is about a new FCC policy which permits customers of the established communications common carriers (1) to act as "brokers" buying basic private line service from a telephone or telegraph company and offering in turn to sell the service to others for a profit, ^{1/} and (2) to aggregate their needs so that they may buy private line service jointly and share both the service and the charges

1/ This first activity is known as "resale," which the Commission defines as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service and facilities to the public (with or without 'adding value') for profit." 60 FCC 2d at 271 (J.A. 41). A "reseller" buys more service than he can use personally for the purpose of selling it to others. His motivation is profit, and his "gimmick" is to make the service more convenient or more personalized or more economical than the service one can get from the underlying carrier. A reseller may "add value" to the service (such as adding features that make the service more suitable for data transmission); or he may merely divide the service package he has bought into smaller packages (such as part-time service, or narrower bandwidths) that will meet the needs of customers who would not or could not buy the larger package from the traditional carriers. For a more detailed description of resale, see 60 FCC 2d at 263, 271-74 (J.A. 31, 41-46).

for obtaining it.^{2/} The policy governs only private line services and facilities, and does not extend to ordinary long distance telephone service, wide area telecommunications service (WATS) and local exchange service.

In this counterstatement, we will describe briefly the regulatory scheme for communications common carriers, the private line services that are the subject of this policy decision, and the restrictions on resale and sharing that led to the proceeding. With that as background, we will summarize the rulemaking proceeding and the Commission's decision.

A. BACKGROUND

The nation's telephone and telegraph companies for many years have had tariff regulations restricting or prohibiting their customers from reselling and sharing communications

^{2/} This second activity is known as "sharing," which the Commission defines as "a non-profit arrangement in which several users collectively use communications services and facilities provided by a carrier, with each user paying the communications related costs associated therewith according to its pro rata usage" 60 FCC 2d at 263 (J.A. 31). Sharing arrangements may be simple joint use agreements in which a number of relatively small users aggregate their needs and allocate a package of services among the group according to demand; or they may be more sophisticated compacts in which an intermediary obtains the services for the sharing users and provides management services for a fee. No participant in a sharing arrangement may profit from the communication services. The customers presumably will obtain service at a lower cost than they would if each were supplied individually by the carrier. See 60 FCC 2d 274-76 (J.A. 45-47).

services and facilities. The carriers had never been called upon to justify these restrictions or prohibitions until the FCC opened this proceeding.^{3/} American Trucking Associations, Inc. (Notice of Inquiry and Proposed Rulemaking), 47 FCC 2d 644, 649 (1974) (J.A. 17).

1. The Regulatory Scheme^{4/}

In creating the FCC in 1934, Congress gave it authority to regulate "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio" 47 U.S.C. §152(a). The Communications Act was made applicable "to all persons engaged within the United States in such communication or such transmission of energy by radio" Id. Congress directed the new agency to make available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" 47 U.S.C. §151. The grant of authority covers not only communication and transmission, but also "all instrumentalities, facilities, apparatus, and services ... incidental to such transmission." 47 U.S.C. §153(a), (e). And

3/ The resale and sharing restrictions are industry-wide. For brevity, we will refer to the AT&T restrictions in this brief, with the understanding that the reference encompasses all carrier restrictions on resale and sharing. See 60 FCC 2d at 276 (J.A. 48).

4/ The pertinent statutes appear in the addendum to this brief.

"transmission" itself is defined to include "both such transmission and all instrumentalities, facilities, and services incidental to such transmission." 47 U.S.C. §153(d).

Common carriers are regulated under Title II of the Act. ^{5/} 47 U.S.C. §§201-223. ^{6/} The Commission has viewed its responsibility with regard to common carriers to include (1) creation and maintenance of a rapid and efficient network, (2) assurance that adequate services and facilities are available, and (3) scrutiny of tariffs and performance to determine whether rates, practices and regulations are just,

^{5/} To the extent that carriers use radio transmission to provide service, they are subject also to Title III of the Act, which governs radio licensing.

^{6/} The definition of common carrier in the Act is not enlightening:

"Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy

47 U.S.C. §153(h). See also 47 C.F.R. §21.1. To determine what is or is not a common carrier within the meaning of the Act, the courts and the Commission have looked to the common law for the definition. See, e.g., National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976); National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 640 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976); CATV and TV Repeater Services, 26 FCC 403 (1959). Cf. United States v. Southwestern Cable Co., 392 U.S. 157, 169 n. 29 (1968).

reasonable and nondiscriminatory. ^{7/} See United States v. AT&T, 427 F.Supp. 57, 60 (D.D.C. 1976), petition for certiorari pending, No. 77-1099, D.C. Circuit.

More specifically, the FCC is responsible under Title II to ensure that carriers offer service only pursuant to "schedules" or tariffs on file with the agency, 47 U.S.C. §203; that the tariff rates, practices and regulations are just and reasonable, 47 U.S.C. §201(b); that carriers provide service on reasonable request, 47 U.S.C. §201(a); that there be no undue discrimination or preference, 47 U.S.C. §202(a); and that carriers obtain appropriate certification before entering upon or terminating service, 47 U.S.C. §214.

The Commission may enforce these and other provisions of the Act by investigating tariffs either before, 47 U.S.C. §204, or after they become effective, 47 U.S.C. §205. In a tariff proceeding, the Commission has authority to find rates, practices and regulations unlawful and to order the unlawfulness terminated. 47 U.S.C. §205(a). On a proper finding, the Commission also may "prescribe" rates, practices

^{7/} See also 47 U.S.C. §218, which requires the FCC to keep itself informed "as to technical developments and improvements in wire and radio communication and radio transmission of energy to the end that the benefits of new inventions and developments may be made available to the people of the United States"; and 47 U.S.C. §303(g), which requires the agency to study new uses of radio and "generally encourage the larger and more effective use of radio in the public interest." The services involved in this case use microwave radio technology almost exclusively.

and regulations governing service offerings, and require carriers to adhere to the prescription. Id. See, e.g., American Telephone & Telegraph Co. v. FCC, 487 F.2d 864, 871-72 (2d Cir. 1973).

The same regulatory scheme which gives the FCC broad powers also leaves the carriers with substantial freedom to exercise business judgment. The Act contemplates that the carrier will initiate rate changes, practices, regulations and new service offerings by filing tariffs, and that these tariffs generally will go into effect without agency approval.^{8/} When this occurs, the agency has not endorsed or sanctioned the carrier-initiated tariff; instead, the tariff merely has become effective by operation of law and the passage of the statutory notice period. 47 U.S.C. §204. AT&T v. FCC, 487 F.2d at 880. The Commission retains the authority under Sections 205 and 403 to investigate such a tariff at any time and to remedy any unlawfulness by issuing a cease and desist order or prescribing just and reasonable tariff provisions. 47 U.S.C. §§205, 403.

The tariff restrictions on resale and shared use of private line services, which are the subject matter of this

^{8/} AT&T v. FCC, 487 F.2d at 872-81. See also United States v. SCRAP, 412 U.S. 669 (1973). The carrier's freedom to initiate tariff changes is subject to limitations that are not relevant here. See, e.g., Permian Basin Area Rate Cases, 390 U.S. 747, 777-81 (1968); American Telephone & Telegraph Co. v. FCC, 519 F.2d 322, 324 (2d Cir. 1975); Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

proceeding, were initiated by the carriers and became effective without FCC approval. They had not been called into question until this proceeding arose. 47 FCC 2d at 649 (J.A. 17).

2. Private Line Services

Interstate communications common carriers offer service that may be divided into two broad categories:

(1) public telecommunications service, including ordinary long distance telephone service (message telecommunications service, or MTS) and wide area telecommunications service (WATS);^{8/}

and (2) private line service, also known as leased line service. See, e.g., M. Irwin, The Telecommunications Industry, 24-25 (1971); President's Task Force on Communications Policy, Final Report, Ch. 6, pp. 9-10 (1968).^{9/} This case deals directly only with the second category, because the Commission has required resale and sharing only of private line services.

Private line service essentially is just what the name suggests: a service in which the customer buys the

^{8/} Western Union Telegraph Company's ordinary telegram service is another public telecommunications service.

^{9/} For a generally accurate and succinct description of the private line communications market, see Note, Resale and Sharing of Private Line Communications Services: A.T.& T. Restriction and FCC Regulation, 61 Va. L. Rev. 679, 681-95 (1975).

privilege of using facilities that are dedicated at least in some significant part to his individual requirements, generally available to him at all times, directly connecting the customer's premises with another point (or other points) selected in advance, usually capable of instant connection between and among the terminal points without the need for dialing a new connection, and tariffed generally at a flat periodic rate rather than on a "toll" basis for each call. Private line service attracts those who have sufficient need for communications between and among designated points to justify paying the periodic rate rather than toll charges for individual calls. Business and government organizations are typical private line customers.

While MTS and WATS traditionally have been monopoly offerings, private line services have been competitive in varying degrees over the years.^{10/} The Commission has found that the demand for more and different private line services exceeds the capacity of the existing carriers to satisfy it. To meet the demand and to stimulate innovation and new

^{10/} See AT&T v. FCC, 487 F.2d at 868, where this Court characterized MTS as "non-competitive" and private line services as "competitive." See also Nader v. FCC, 520 F.2d 182, 187 (D.C. Cir. 1975). The private line market has been competitive for many years, although the competition was not vigorous until the early 1970s. See Wilson & Co. v. FCC, 335 F.2d 788 (7th Cir. 1964), remanded for consent settlement, 382 U.S. 454 (1966), which recognized the long-standing competition between AT&T and the Western Union Telegraph Company for some kinds of private line business. The Commission also has made radio frequencies available for private microwave systems for companies and other organizations (footnote continued on next page)

technology, the Commission has authorized a number of private line carriers to enter the market in competition with AT&T and the other established carriers. See, e.g., Specialized Common Carrier Services, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), aff'd sub. nom. Washington Utilities & Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975); Domestic Communication-Satellite Facilities, 35 FCC 2d 844, 38 FCC 2d 665 (1972); Telenet Communications Corp., 46 FCC 2d 680 (1974).

While competition has arisen in voice as well as data communications, a primary focus of new entrants has been the fast growing and largely undeveloped market for nonvoice communications. 47 FCC 2d at 645 (J.A. 13).. The FCC's policy of fostering competition in private line services has rested in large part on (1) its perception of inadequacies of present service and (2) the potential for innovation both in technology and in marketing that aspiring new entrants have shown.^{11/} Id. See also Specialized Common Carrier Services,

^{10/} (footnote continued from previous page)
with sufficient need for point-to-point service to justify building their own communications systems. Allocation of Frequencies in the Bands above 890 Mc., 27 FCC 359 (1959), 29 FCC 825 (1960). While these frequencies may not be used for common carriage, they do offer indirect competition to the established carriers' private line services.

^{11/} The Commission first perceived the need for new companies capable of providing flexible, tailored private line services during its Computer Inquiry, which began in 1966. Customer Interconnection (Docket No. 20003), 61 FCC 2d 766, 781-82 (1976). The Computer Inquiry resulted in rules governing the participation of common carriers in data processing activities. Computer Inquiry, 28 FCC 2d 291 (1970), aff'd in part sub. nom. GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

29 FCC 2d at 904-20. The resale and sharing decision extends the Commission's policy of making private line service available to potential users through vigorous competition.^{12/}

^{12/} FCC Chairman Wiley recently made an optimistic report to Congress on the FCC's pro-competition policies:

[T]he domestic telecommunications industry today is generally in excellent condition with respect to both quality and cost of services provided to the public and financial condition Total industry revenues and earnings have been growing at 10-12% annually for the past several years, although rates for services to the public have increased far less Moreover, while it is too soon to ascribe any overall trend for the new competitive suppliers of interstate private line services . . . , they have already contributed much in the way of creativity and we are confident that they too will become healthy additions to the industry. With regard to service, the past few years have seen a very significant increase in offerings to the general public and to various users of specialized telecommunications equipment and services both by the Bell System and independent telephone companies, and by their competitors We believe these innovative developments, which have come from both the telephone industry and various independent suppliers, have been stimulated to a very significant degree by Commission and court actions which have opened selected sectors of the telecommunications market--not including basic telephone service, I might note--to competition.

Statement of Richard E. Wiley before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, March 21, 1977.

3. Restrictions on Resale, Sharing

AT&T and other carriers traditionally, as a general proposition, have insisted upon serving each customer individually and directly. They have filed tariff provisions forbidding customers from obtaining basic private line services and reoffering it to others as resale brokers. Other tariff provisions have forbidden arrangements whereby several customers collectively might use private line services or WATS on a shared or joint use basis.^{13/}

The prohibitions have not been absolute, but have made exceptions for other carriers, certain customers and classes of users, as the carriers have seen fit. For example, AT&T for many years has furnished facilities and services to Western Union, which, in turn, has "resold" their use as part of its regulated common carrier offering.^{14/} AT&T also has permitted specified groups of users to share service obtained on their behalf by an authorized intermediary,

^{13/} There are no restrictions on sharing of ordinary long distance telephone service, because the telephone company can collect toll charges from the subscriber regardless of who places the calls. "Resale" of MTS for a profit is prohibited, with explicit FCC sanction. See Ambassador, Inc. v. U.S., 325 U.S. 317 (1945), and United States v. AT&T, 57 F. Supp. 451 (S.D.N.Y. 1944), aff'd sub nom. Hotel Astor, Inc. v. U.S., 325 U.S. 837 (1945), affirming FCC-approved tariff regulations barring hotels from imposing surcharges on interstate toll calls.

^{14/} See Western Union Telegraph Co. v. FCC, 541 F.2d 346 (3d Cir. 1976), cert. denied, 429 U.S. 1092 (1977).

under the so-called "single customer" tariff exception. A prominent "single-customer" is Aeronautical Radio, Inc., the petitioner in No. 77-4075 in this Court, which has special authority under the tariffs to obtain private line service as a communications supplier for the nation's airlines. The securities industry, electric utilities and government agencies have similar special status. For a summary of tariff restrictions on resale and sharing, see 47 FCC 2d 644-53 (J.A. 12-21).

These restrictions raise both legal and policy questions. The legal questions are whether the restrictions violate the right of customers to service on reasonable request, 47 U.S.C. §201(a), and whether they result in unjust or unreasonable discrimination or preference among customers, 47 U.S.C. §202(a). The fundamental policy questions relate to the public need for service and the choice of regulatory actions to satisfy the need.

B. THE RESALE AND SHARING PROCEEDING

In 1972, the FCC received a complaint from the American Trucking Associations, Inc., alleging that AT&T's sharing restrictions were discriminatory. (J.A. 177, 206). The trucking association (ATA) pointed out that AT&T permitted the airlines to share services and facilities through Aeronautical Radio, Inc., in a manner that was forbidden to the trucking industry. After receiving comments from

several interested parties, the Commission designated the ATA complaint for hearing to determine the lawfulness of the relevant tariff provisions. American Trucking Associations, Inc. v. AT&T, 41 FCC 2d 2 (1973) (J.A. 495).

The Commission also received petitions for rulemaking from two carriers,^{15/} asking for a general investigation into resale and sharing with a view to adopting new rules or policies. On consideration of responsive comments to the petitions and of a motion to consolidate the proposed rulemaking with the ATA complaint,^{16/} the Commission in July 1974 initiated Docket No. 20097 with the issuance of a Notice of Inquiry and Proposed Rulemaking. American Trucking Associations, Inc., 47 FCC 2d 644 (J.A. 12). The Notice set forth a number of specific issues on which comment was invited. 47 FCC 2d at 656-57 (J.A. 24-25). The basic question, however, was stated succinctly:

whether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell

^{15/} Petition for Rulemaking of Microwave Communications, Inc., June 13, 1972 (J.A. 425); Petition for Inquiry and Rulemaking of Western Union Telegraph Co., June 25, 1973 (J.A. 501).

^{16/} Motion to Consolidate, or in the Alternative, Motion to Hold Complaint in Abeyance, filed by Microwave Communications, Inc., November 7, 1972. (J.A. 485). MCI filed its motion before the FCC had designated ATA's complaint for hearing.

such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use.

47 FCC 2d at 644 (J.A. 12). The Notice incorporated the ATA complaint into the broad rulemaking proceeding.^{17/}

The Notice made clear that the FCC intended to resolve important industry-wide policy questions through rulemaking:

[T]he question of the availability of services for resale or shared use and the regulation thereof underlies various matters before us. It would be inappropriate to consider this question in the context of some particular item, such as an application for authorization of service, a tariff filing or a complaint against a particular carrier. The nature of the issues that must be considered, their complexity, their basic impact on the overall structure of the industry, the number and diversity of parties interested in the issues as well as the expedition with which they must

^{17/} The FCC explained that the "close interrelationship" between ATA's complaint and the tariff provisions under review in the rulemaking called for consolidation. It found also that written submissions were more appropriate than the evidentiary proceedings it had established for the ATA complaint because of "the nature of the evidence to be adduced and the number of parties" 47 FCC 2d at 653 (J.A. 21.)

be resolved . . . requires that the questions . . . be considered in a broad rulemaking proceeding Having received the information, opinions and recommendations of all interested parties we will be in a position to take appropriate action, including the establishment of policy guidelines, by rule or otherwise, the recommendation of any desirable legislative changes or the modification of existing carrier practices.

47 FCC 2d at 645-46 (J.A. 13-14). ^{18/}

The Notice also set forth in some detail the procedures the FCC would follow. Because the purpose was to establish broad policies to govern the entire communications common carrier industry, the Commission found it appropriate to invite public participation in written form. It provided for three rounds of comment, and held open the possibility of further proceedings, including oral hearings "if and to the extent that such procedures appear necessary or appropriate." 47 FCC 2d at 657-59 (J.A. 25-27).

^{18/} See also 47 FCC 2d at 657 (J.A. 25), where the FCC stated that its primary objective was information that would enable it "to establish policies with regard to resale and shared use of common carrier facilities and to take action necessary to effectuate such policies."

Two years later, after considering the substantial record it had compiled,^{19/} the Commission issued its Report and Order. 60 FCC 2d 261 (J.A. 28). On the procedural question, the FCC addressed once more the argument that an oral evidentiary hearing was necessary, and concluded once again that "notice and comment" procedures were appropriate for this policy decision. 60 FCC 2d at 262, 325-30 (J.A. 29-30, 117-26). Noting that it had reserved the option of holding further proceedings, including oral hearings, "if and to the extent that such procedures appear necessary or appropriate," the FCC determined that the record before it "was adequate for resolution of the issues in this proceeding" 60 FCC 2d at 262 (J.A. 30). Accordingly, it terminated the proceeding with the report and order. Id.

The decision can be summarized as follows:

1. The FCC found that AT&T's restrictions on resale and shared use of private line services were unlawful. First, they were unjust and unreasonable in violation of Section 201(a) because they prohibited the use of the communications system in ways that were privately beneficial

^{19/} The record includes written comments by 39 parties, reply comments by 36 parties, and third-round comments by 23 parties. 60 FCC 2d 323-25 (J.A. 114-16). In addition, it includes numerous applications for stay and petitions for reconsideration or clarification filed after the first decision came out. The record fills nine docket volumes, counting the material filed in the ATA complaint proceeding and incorporated into the resale docket.

without being publicly detrimental. In statutory terms, the restrictions amounted to a refusal to furnish communication service "upon reasonable request therefor." 60 FCC 2d at 280-81, 282-83, 298-303 (J.A. 55, 57-58, 78-83). Second, they were unduly discriminatory in violation of Section 202(a) because they permitted resale and sharing to some while prohibiting it to most, without rational justification. 60 FCC 2d at 281-82, 283-85 (J.A. 55-57, 59-60).

2. The FCC determined that tariff regulations permitting unlimited resale and sharing of private line services and facilities would be just and reasonable, and prescribed such regulations pursuant to Section 205(a). The finding of justness and reasonableness proceeded from specific findings of public benefits which the Commission expected to result from its new policy. It summarized the benefits after discussing them in some detail:

[W]e reasonably expect the following benefits to result from elimination of all tariff restrictions on resale and shared use of private line services: a further trend toward cost-related pricing by underlying carriers; a reduction in the public resources devoted to enforcement of Section 201(b) and 202(a); more efficient utilization of existing communication capacity; better management of communications networks; improved marketing of

communications services and facilities;
wider variety of communications
offerings; and increased research,
development, and implementation of
communications technology.

60 FCC 2d at 302 (J.A. 83). For a discussion of the
benefits, see 60 FCC 2d at 298-303 (J.A. 78-83).^{20/}

3. The FCC found that resale carriers were
communications common carriers within the meaning of that
term in the Act, and that they were subject to regulation
under Title II. Resellers were common carriers, the Commission
concluded, because they undertook to serve the public
indiscriminately for hire. It adopted an "open entry" policy
under Section 214, in which resale carriers will obtain
certification upon a showing of technical, legal and financial
qualification.^{21/} The Commission will require Section 214
authority for exit from the market, but only if the particular
carrier's exit will result in impairment, reduction or
discontinuance of service. Rates must satisfy the statutory
standards; but the Commission indicated that it would allow

^{20/} In listing the benefits, the Commission conceded that it
could not forecast their realization with certainty. However,
it found that resolution of the issues "need not await
development of detailed proof of the benefits." It is sufficient,
the FCC said, "that our expectations be reasonable conclusions."
60 FCC 2d at 303 (J.A. 83).

^{21/} The Commission will not require an applicant to show (1)
a special need for the service that an existing carrier cannot
meet, (2) that the proposed service "adds value" to the
underlying carrier's service, or (3) the degree of economic
impact certification may have on other carriers. 60 FCC 2d at
308-12 (J.A. 93-96).

the carriers to determine their own approach to ratemaking in the first instance, and would subject them to investigation only on a case-by-case basis as the need arose. ^{22/} 60 FCC 2d at 303-16 (J.A. 84-100).

4. The FCC determined that customers sharing service--either by joint use or through non-profit intermediaries--were not engaged in common carriage, because there was no undertaking to serve the public indiscriminately. Instead, sharing is merely a private arrangement for obtaining service in the aggregate for individual users who would not or could not obtain appropriate and economical service separately. The Commission thus will not regulate sharing arrangements under Title II. However, the FCC found that it had jurisdiction over sharing "reasonably ancillary" to the effective performance of its common carrier responsibilities; and it undertook to ensure that sharing does not "take on

^{22/} The Commission made reference to its ratemaking policy "for new carriers not providing monopoly services, in a newly developing competitive market." 60 FCC 2d at 314-15 (J.A. 99) See Southern Pacific Communications Corp., 59 FCC 2d 1116, 1117 (1976), where the FCC stated, in declining to initiate rate investigation, that it would "maintain regulatory flexibility at the outset [with regard to new carriers in competitive markets] to encourage innovation and competitive costs and charges." See also American Satellite Corp., 55 FCC 2d 1, 2-3 (1975).

the characteristics of common carriage" without appropriate scrutiny.^{23/} 60 FCC 2d at 316-21 (J.A. 102-08).

5. The FCC decided not to require changes with regard to the public services--MTS and WATS. It could not make the affirmative findings of public benefit that were present with private lines; and it concluded that resale and sharing of WATS, in particular, might result in a "significant shift" of MTS toll calls to WATS, possibly requiring a rate increase for long distance service. 60 FCC 2d at 289-91 (J.A. 66-67).^{24/}

6. The FCC ordered the carriers to file tariffs carrying out its policy directives. 60 FCC 2d at 322 (J.A. 109).

On petitions for reconsideration and requests for clarification, the Commission decided not to extend its policy to the international carriers in this proceeding. It will consider resale and sharing of international services

^{23/} While the Commission does not allow any "element of profit" among sharers, its regulatory treatment of sharing arrangements does not turn on profit in itself: "We base this position not merely upon the presence of profit. Rather, we look to the substantial likelihood of an indiscriminate offering to the public once one sharer seeks to engage in a profit-making activity." 60 FCC 2d at 317 (J.A. 102). Common carriage is an indiscriminate offering of service to the public; profit is merely an indication of such an offering.

^{24/} The Commission also made clear that unlimited resale and sharing of private line service does not permit conversion of private lines into facilities providing the equivalent of long distance service or WATS. Any resale or sharing "must maintain the basic private line character of the underlying service." 60 FCC 2d at 293 (J.A. 70).

in a separate docket. The Commission also withdrew its requirement that Western Union^{25/} establish a separate corporation to conduct its resale operations in isolation from the parent corporation. Memorandum Opinion and Order (Reconsideration), 62 FCC 2d 588, 593-94 (J.A. 152, 159-60).^{26/} Otherwise, the Commission reaffirmed its decision, clarified certain matters, and restated its basic conclusion as to procedural and substantive issues.

The petitions for review that are now before this Court followed the order on reconsideration. The Commission on March 2, 1977, denied AT&T's request for stay pending judicial review. (J.A. 173). On March 22, this Court heard oral argument on AT&T's motion for judicial stay pending review, and denied the motion from the bench. On March 23, AT&T and the other underlying carriers filed tariffs to implement the decision. The tariffs are scheduled to become effective on June 21.

^{25/} The "separate corporation" requirement on its face was not directed solely to Western Union. It sought to avoid possible cross subsidies within any carrier organization which embraced both monopoly and resale services. 60 FCC 2d at 315-16 (J.A. 100-01). On reconsideration, the Commission was convinced that Western Union was the only carrier to whom the requirement would apply, and that the likely administrative costs of separation might outweigh the benefits. 62 FCC 2d 588, 593-94 (J.A. 160).

^{26/} As a result of the two changes on reconsideration, petitions for review filed by ITT World Communications, Inc. (No. 76-4190), RCA Global Communications, Inc. (No. 76-4201), and Western Union (No. 76-4237) were withdrawn.

INTRODUCTION TO THE ARGUMENT

No petitioner in this Court has challenged the Commission's authority to require unlimited resale and sharing or has seriously questioned either the reasonableness of the substantive policy or the findings on which it is based. In fact, four of the six petitioners either endorse the basic policy or expressly urge the Court to affirm it.^{27/} Even the two telephone company petitioners challenge only the procedures and adequacy of the record (AT&T) and the relatively narrow decision not to regulate sharing arrangements under Title II (United System Service, Inc.). The questions for this Court on review, then, are not broad.

The challenges arise from different perspectives. AT&T, which apparently will be most affected by the decision, argues primarily that the Commission did not follow appropriate procedures and that its record was inadequate to support the decision. United System Service, Inc. (which represents 25 "independent" telephone companies) and Telenet Communications Corp. (a resale carrier) contend that the Commission erred

^{27/} See Brief for Petitioner International Business Machines Corp., p. 11 n. 27; Brief for Petitioner Telenet Communications Corp., p. 6; Brief for Petitioner Aeronautical Radio, Inc., p. 2; Statement of Petitioner Securities Industry Automation Corp., p. 2. Securities Industry Automation Corp. reserved the option to file an intervenor's brief in response to the briefs of other petitioners. Statement, p. 2. Insofar as its intervenor's brief opposes any part of the Commission's decision, FCC counsel may seek leave to respond.

in declining to regulate sharing arrangements as common carriage. International Business Machines Corp., by contrast, which perceives a wider market for its equipment under the new policy, argues that the FCC should have left resellers as well as sharing arrangements unregulated.

And Aeronautical Radio, Inc. (ARINC) contends (with questionable relevance to this case) ^{28/} that the Commission's procedures and record were defective insofar as they relate to disallowance of the airlines' preferred customer status and the availability of the Telpak discount rate.

We will limit the argument primarily to showing that the procedures were adequate and appropriate to the task the Commission set for itself; that resale is lawfully subject to regulation as common carriage; and that the Commission reasonably exercised its discretion in deciding how to regulate both resale and shared arrangements.

^{28/} We will show in the argument that ARINC's complaint is not properly before this Court, both because it is not aggrieved by the resale and sharing decision and because this decision did not require withdrawal of the Telpak discount rates.

ARGUMENT

- I. NEITHER THE ADMINISTRATIVE PROCEDURE ACT NOR SECTION 205 OF THE COMMUNICATIONS ACT REQUIRES PROCEDURES DIFFERENT FROM THOSE OBSERVED HERE, BECAUSE THE FCC WAS MAKING POLICY FOR FUTURE APPLICATION TO THE ENTIRE INDUSTRY BY PRESCRIBING TARIFF REGULATIONS AND BECAUSE THERE WERE NO FACTUAL QUESTIONS REQUIRING ORAL EVIDENTIARY HEARINGS.
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The Commission conscientiously considered^{29/} the procedural questions at three stages in this case. Each time it concluded that "notice and comment" rulemaking, with an opportunity for further and possibly oral hearings if a need were shown, was not only adequate but particularly appropriate. The Commission viewed the proceeding as a vehicle for developing and promulgating new and far reaching communications policy that would be applicable generally to the entire industry. This view was evident in the Notice:

The nature of the issues that must be considered, their complexity, their basic impact on the overall structure of the industry, the number and diversity of parties interested in the issues as well as the expedition with which they must be resolved . . . requires that the questions . . . be considered in a broad rulemaking proceeding.

47 FCC 2d at 645 (J.A. 13). Its correctness is underscored by the list of parties sufficiently interested to participate

^{29/} 47 FCC 2d at 657-59 (J.A. 25) (Notice of Inquiry and Proposed Rulemaking); 60 FCC 2d at 325-30 (J.A. 117-26) (Report and Order, Appendix D); 62 FCC 2d at 588-93 (J.A. 153-59) (Memorandum Opinion and Order, Reconsideration).

in the FCC proceeding, and the fact that many of those parties have pursued their interests in this Court.

A. "Notice and Comment" Rulemaking Satisfied
The Requirements of the Administrative
Procedure Act.

The Commission plainly was making a "rule" within the definition of that term in the Administrative Procedure Act:

"rule" means the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. §551(4). The purpose was to make policy of general applicability and future effect by means of a prescription for the future of tariff regulations. In the absence of an express statutory requirement of more elaborate procedures, the APA in such circumstances calls for (1) a notice of proposed rulemaking setting forth the agency's legal authority and a description of the subjects and issues involved, (2) an opportunity for interested parties to submit written data, and (3) a concise general statement of the rules and their basis and purpose. 5 U.S.C. §553.

This Court has consistently held that notice and comment procedures are appropriate for making policy. In an

earlier FCC case involving presunrise broadcast policies with applicability to the entire radio industry, the Court approved the rulemaking approach to license modification in the face of claims that a relevant statute required evidentiary hearings. WBEN, Inc. v. U.S. and FCC, 396 F.2d 601, cert. denied, 393 U.S. 914 (1968). The Court held:

[W]hen, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them.

^{30/}
396 F.2d at 618. See also, Air Line Pilots Ass'n v. Quesada, 276 F.2d 892, 895-98 (2d Cir. 1960); Air Line Pilots Ass'n v. CAB, 215 F.2d 122, 124 (2d Cir. 1954). Cf. Radio Relay Corp. v. FCC, 409 F.2d 322, 331 (2d Cir. 1969) (agency rulemaking did not require evidentiary hearing in the absence of genuine issues of material fact).

^{30/} The Court relied upon still another FCC case, United States v. Storer Broadcasting Co., 351 U.S. 192, 201-05 (1956). The Supreme Court in Storer held that a statutory requirement of a "full hearing" before a license application could be denied did not deprive the FCC of rulemaking authority to deal with industry problems, even if the rule would bar license applications at the threshold. See also Federal Power Commission v. Texaco, Inc., 377 U.S. 33, 39-45 (1964); American Trucking Ass'ns v. U.S., 344 U.S. 298, 318-20 (1953).

AT&T appears to recognize that the FCC established new and important policy. (E.g., AT&T Br., pp. 25-28, 47.) But it sees this as a reason for having an evidentiary hearing. AT&T's reasoning on this point appears to be that the decision has "special and particular implications for AT&T"^{31/} because it owns most of the facilities involved. (AT&T Br., p. 27). This argument comes down to a claim that if you are big enough to dominate an industry, as AT&T does the communications industry, you are entitled to protracted evidentiary proceedings before the regulatory body can take any significant action--proceedings that might not be required at the instance of a smaller member of the industry. The unfairness of such a claim is obvious. The potential for obstructionism is even more plain.^{32/}

^{31/} The Supreme Court rejected a similar argument in affirming the Interstate Commerce Commission's use of rulemaking to prescribe industry-wide rates for the use of freight cars. The Court concluded: "The fact that the order may in its effects have been thought more disadvantageous by some railroads than by others does not change its generalized nature." United States v. Florida East Coast R. Co., 410 U.S. 224, 246 (1973). The "special and particular implications" of the prescription for those petitioners did not stand in the way of notice and comment rulemaking.

^{32/} Judge Leventhal of the District of Columbia Circuit, rejecting an argument that evidentiary hearings were required in a Civil Aeronautics Board policy ruling, found that the demand for adjudicatory-type proceedings in that case "is at least consistent with, though we do not say it is attributable to, a desire for protracted delay." American Airlines, Inc. v. CAB, 359 F.2d 624, 633 (D.C. Cir. 1966).

In fact, the importance of the decision and its foundation in the FCC's public interest mandate might have made an adjudicatory hearing entirely inappropriate. The Ninth Circuit suggested this in a recent opinion affirming a strikingly similar FCC decision which opened the way for the entry of competitive specialized common carriers into the private line services market. There, the established carriers and others had urged the Commission not to hold rulemaking proceedings but to consider each applicant on an ad hoc basis.^{33/} Specialized Common Carrier Services, 29 FCC 2d 870, 31 FCC 2d 1106. The Ninth Circuit stated:

[A long series of cases starting with United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), and including WBEN, Inc., 396 F.2d 601, rejects the assumption that adjudicatory proceedings are preferred if not mandated for the determination of issues central to the public interest. When, as here, the issue is resolved by adoption of a general policy for uniform application in the regulation of a nationwide industry, rulemaking is an entirely appropriate means for "a particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress in enacting the Communications Act of 1934."

^{33/} The statutes purportedly requiring hearings in that case were Sections 214 and 309 of the Act. Section 309(e) requires a "full hearing" on applications as to which the Commission is unable to find that grant would serve the public interest. AT&T relies in this case upon Section 205(a), which affords a "full opportunity for hearing" before the FCC can prescribe rates, practices and regulations.

Washington Utilities & Transportation Commission v. FCC,
513 F.2d at 1164 (citation omitted).^{34/}

Some courts, including this one, appear actually to prefer rulemaking over adjudication in some circumstances where either procedure arguably is available. E.g., National Labor Relations Board v. Wyman-Gordon Co., 394 U.S. 759 (1969); GTE Service Corp. v. FCC, 474 F.2d 724, 732 (2d Cir. 1973); General Telephone Co. of the Southwest v. FCC, 449 F.2d 846, 863 n.15 (5th Cir. 1971); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966); National Labor Relations Board v. Majestic Weaving Co., 355 F.2d 854, 860-61 (2d Cir.

^{34/} See also Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975), where the court rejected AT&T's argument that the FCC could not require interconnection by general rulemaking in the light of the Section 201(a) hearing requirement. The court explained:

When an administrative agency develops a general policy applicable on a prospective basis, courts have found it unnecessary to require evidentiary hearings This reluctance to prescribe evidentiary hearings on matters of general policy is grounded largely in practical considerations. Evidentiary hearings become "totally unmanageable" when parties attempt to cross-examine the large number of persons normally interested in the development of policy.

503 F.2d at 1266. It is not difficult to imagine the chaos that would have attended cross examination in this case with its numerous parties and diverse interests. Even in this Court, no two parties agree in every aspect of the case.

1966).^{35/} In any event, it is plain that the APA itself requires no more than notice and comment when an agency makes rules or policies, as the FCC did here.

B. Section 205(a) Does Not Require an Evidentiary Hearing in the Absence of Significant Questions of Disputed Fact.

AT&T argues that an evidentiary hearing was required under Section 205(a) because the Commission prescribed tariff regulations and rates.^{36/} Because Section 205(a) authorizes

^{35/} This Court went so far in one case as to hold that rulemaking was mandatory, where it found that an agency had altered long-standing policy in ad hoc adjudication. Bell Aerospace Co. v. NLRB, 475 F.2d 485 (1973). The Supreme Court reversed that holding, adhering to the rule that agencies have discretion to proceed either by adjudication or by rulemaking. National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267 (1974). But rulemaking remains at least an option for agencies considering substantive policy changes, if not an expressly preferred option. Compare Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1970). In Bell Telephone Co. of Pennsylvania, 503 F.2d at 1265, the Third Circuit pointed out that several courts "have come to favor rulemaking over adjudication for the formulation of new policy." It found the rationale of those courts "logical and persuasive":

Non-evidentiary rulemaking permits broad participation in the decision-making process and enables an administrative agency to develop integrated plans in important policy areas.

^{36/} The Commission agrees that it prescribed a regulation permitting unlimited resale and sharing of private line services. But it did not prescribe rates. A rate prescription, as AT&T knows, would bind the carrier to particular charges, "to be thereafter followed." 47 U.S.C. §205(a). See Nader v. FCC, 520 F.2d 182, 199-205 (D.C. Cir. 1975); AT&T v. FCC, 519 F.2d at 324. Once the FCC has prescribed rates, the carrier may (footnote continued on next page)

prescriptions only "after full opportunity for hearing," AT&T contends that it was entitled to the full range of procedures set forth in Sections 7 and 8 of the APA, 5 U.S.C. §§556, 557, including the right to present oral testimony and to cross examine adverse witnesses. It cites three decisions of this Court in support of its claim.^{37/}

Section 4(b) of the APA, 5 U.S.C. §553(c), makes the adjudicatory procedures of Sections 556 and 557 applicable to rulemaking when the rules "are required by statute to be made on the record after opportunity for an agency hearing." But recent Supreme Court decisions have limited this exception to its literal terms, requiring trial-type hearings only when the regulatory statute unambiguously requires a hearing "on the record." Mere use of the word "hearing" is not sufficient.

^{36/} (footnote continued from last page)
revise them "only with prior Commission permission." AT&T v. FCC, 487 F.2d at 874, quoted at AT&T v. FCC, 519 F.2d at 324. AT&T plainly has not been directed to adopt or adhere to any particular rate or rate limitation in this order. The new policy on resale and sharing may well require rate adjustments. But they will be initiated by the carrier, and may be changed at will, so long as the requirements of Sections 203 and 204 are met. To the extent that AT&T v. FCC, 449 F.2d 439, 451 (2d Cir. 1971), indicates that the FCC's prescription of unlimited sharing also involved a rate prescription, we respectfully submit that the Court erred on that point. The statement was dicta, and it proceeded apparently from the assumption that the FCC's order had bound AT&T to specific rates. In fact, AT&T was free to change these rates at any time, or to abandon the rate structure in question altogether. We will not address the question of rate prescription further, because it is not a part of the FCC order.

^{37/} AT&T v. FCC, 487 F.2d 865; National Ass'n of Motor Bus Owners v. FCC, 460 F.2d 561 (1972); AT&T v. FCC, 449 F.2d 439.

United States v. Florida East Coast R. Co., 410 U.S. 224, 238-46 (1973).^{38/} That case is directly controlling here, because it, too, involved a policy prescription of general applicability to a nationwide industry, pursuant to a statute affording an opportunity for hearing. Id. The Court found notice and comment procedures to be lawful and appropriate, rejecting an argument virtually identical to AT&T's.^{39/}

Florida East Coast Railway also pointed out that even where Sections 556-557 are applicable to rulemaking, they may be satisfied by hearing procedures that do not include oral testimony and cross examination.^{40/} Indeed, Section 556(d) expressly states:

^{38/} See also United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 753-58 (1972).

^{39/} The Supreme Court distinguished Morgan v. United States, 304 U.S. 1 (1938), and ICC v. Louisville & Nashville R. Co., 227 U.S. 88 (1913), which AT&T cites in this Court, as "pre-APA" cases which were essentially adjudicatory. Florida East Coast Railway would appear to have undercut any precedential value those cases might have had on the issue AT&T has raised.

^{40/} The Commission has conducted "paper hearings" on important rate questions in reliance upon the Court's reading of Section 556(d). See, e.g., AT&T (Hi-Lo rates), 58 FCC 2d 362 (1976), review pending sub nom. Commodity News Services, Inc. v. FCC, No. 75-2057, D.C. Circuit. See also Specialized Common Carrier Services, 29 FCC 2d 870, 31 FCC 2d 1106.

In rulemaking . . . , an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Thus, even if Sections 556-557 were applicable to prescription proceedings under Section 205, there would be no requirement of oral presentation of evidence and cross examination in the absence of prejudice. The Commission gave the parties an opportunity to request further proceedings if they believed the notice and comment procedures would prejudice them. 47 FCC 2d at 658 (J.A. 26). Neither AT&T nor any other party persuaded the FCC that it needed trial-type procedures, and the Commission made its decision on the basis of the ample comments. 60 FCC 2d at 262, 325-30 (J.A. 30, 117-26); 62 FCC 2d at 588-93 (J.A. 153-159). The Commission cannot be faulted for its procedures.

The cases cited in support of trial-type hearing are not controlling. In AT&T v. FCC, 449 F.2d 439 (1971), this Court affirmed the Commission's finding, after a trial-type hearing, that AT&T's restrictions on sharing of its discount rate Telpak service were unlawfully discriminatory. However, the Court struck down the Commission's attempt to prescribe unlimited sharing, holding that the agency had not made the required statutory finding that unlimited sharing was just and reasonable. 449 F.2d at 450. The Court said that the

FCC's failure to make the requisite finding apparently resulted from the inadequacy of the record to support such a finding. 449 F.2d at 451. Nowhere did the Court even hint that trial-type hearings were required, however, because that issue was not in the case.

One aspect of this Court's decision in the Telpak sharing case, which AT&T has not brought to the Court's attention, is instructive in this case. AT&T had argued there that the Commission's procedures had violated Section 409(c) of the Communications Act because staff members of the Common Carrier Bureau had advised the Commission on its decision after participating in the hearing.^{41/} Although the Court found this dual role to be "ill-advised," 449 F.2d at 453, it rejected AT&T's argument on grounds that Section 409(c) applies only to adjudication, and not to rate prescription rulemaking. The Court's discussion of the matter bears quotation at some length:

Telpak and Telpak sharing are clearly rate practices There is no question that the rate practice prescribed by the Commission--unlimited sharing--is for the future, and no issue of damages for past acts was involved

^{41/} Section 409(c) provides that, in any case of adjudication, a person who has participated in the presentation of a case in hearing shall not directly or indirectly make ex parte presentations to the hearing officer or the Commission.

[T]he key questions of fact here were "legislative" rather than "adjudicatory" -- that is, they were matters of statistics, economics, and expert interpretation, rather than questions of whether AT&T had violated some norm . . . or other judicial questions of who did what, when, and where. Consequently, the proceeding here was plainly rulemaking within the meaning of the APA, rather than adjudication

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We cannot accept the petitioners' argument that this proceeding was in reality adjudicatory because the Commission's prescription was ancillary to an investigation of the past practice and regulations with regard to sharing Under petitioners' theory, any rulemaking which included an examination of past practice or experience would be transformed into adjudication--an outcome plainly at odds with the statute and case law [T]he proceeding here was clearly concerned with "legislative" questions and the action contemplated was a "statement of general *** applicability and future effect"--the requirements for a rulemaking proceeding.

42/
449 F.2d at 454-55. We submit that this analysis--the Court's only discussion of procedure in the Telpak sharing case--supports the Commission's position on procedures in this case.

AT&T's second case, N.A.M.B.O. v. FCC, 460 F.2d 561 (2d Cir. 1972), did not deal at all with the question of procedures for prescription. N.A.M.B.O. was a case in which the Court was asked to review the Commission's action

42/ See also Wilson & Co. v. U.S. and FCC, 335 F.2d at 796-97.

in response to the remand in the Telpak sharing case. The holding in N.A.M.B.O. was simply that the FCC had not erred in leaving it to AT&T to remedy the Telpak discrimination without prescribing a remedy itself. The references to hearings are not essential to the Court's decision; nor do they indicate what kind of hearing would satisfy Section 205(a). Plainly, N.A.M.B.O. did not decide the question AT&T has raised.^{43/}

^{43/} AT&T's third principal case, AT&T v. FCC, 487 F.2d 865, is also off the mark. In that case, the Court struck down an FCC order requiring AT&T to obtain "special permission" before filing rate changes. The Court found that the requirement was tantamount to a prescription of rates because it "compels the carrier to adhere to a fixed rate which can be revised only with prior Commission permission." The Court said that a prescription could come only after satisfaction of the procedural requirements of Section 205(a). It did not address the crucial question of this case, however, because it was not asked to determine what kind of hearing would satisfy Section 205. This case does not involve an attempt to circumvent the statutory scheme of carrier initiated rates and practices. Instead, the FCC has worked within that scheme, exercising its prescription power under Section 205(a). Two District of Columbia Circuit cases cited by AT&T, Independent Bankers Ass'n v. Board of Governors, 516 F.2d 1206 (1975), and Mobil Oil Co. v. FPC, 483 F.2d 1238 (1973), do not support AT&T's claim. Independent Bankers reversed a summary action on an individual application for approval of an acquisition, the court finding (1) that the matter was pure adjudication, and (2) that essential facts were in dispute. 516 F.2d at 1218, 1222-26. It expressly recognized the authority of agencies to act by informal rulemaking on "essentially legislative" matters, such as the adoption of general rules for an entire industry. 516 F.2d at 1218. Mobil Oil interpreted Florida East Coast Railway as recognizing a continuum of procedural requirements in which there is no "either-or" choice between notice and comment rulemaking and full trial-type hearings. 483 F.2d at 1249-50. The court said that agencies should tailor their procedures to the questions. That is precisely what the FCC did here, establishing three rounds of comment and leaving open the possibility of oral hearings if the circumstances warranted. This was neither pure informal rulemaking nor trial-type adjudication.

AT&T's argument that "disputed factual issues" required a hearing collapses when it attempts to articulate what those issues are. After promising throughout its brief to list the issues, AT&T can come up with only two "factual issues"--both of which are more accurately characterized as policy issues to be determined by the agency on the basis of underlying facts and expert inferences from facts. (See AT&T Br., pp. 44-47.)

AT&T's first "factual issue" is "whether the creation of layers of middlemen between carriers and users will adversely affect the public." (AT&T Br., p. 44). Setting aside AT&T's editorial license in phrasing the question, we submit that this is the ultimate policy issue the Commission set out to resolve--not a subsidiary question of fact. The Notice stated that the "basic question" in this proceeding was "whether, and under what conditions, subscribers of the various service offerings . . . should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services" ^{44/} 47 FCC 2d at 644 (J.A. 12). AT&T has merely rephrased that question in pejorative terms

^{44/} The second part of the "basic question" was how to regulate resale and sharing if it were prescribed. Id.

and labeled it a "factual issue." This plainly is a question of ultimate "legislative" fact which does not require trial-type hearing.

AT&T's second and last "factual question" is what the "revenue and rate consequences" of resale and sharing will be. (AT&T Br., p. 45). This, too, is a "legislative" issue. It does not lend itself to precise resolution by testimony, charts and cross examination. Judge Leventhal addressed himself to precisely this kind of question in American Airlines, Inc. v. CAB, 359 F.2d at 633, and found that it did not warrant a trial-type hearing:

The particular point most controverted by petitioners is the effect of the CAB regulation on their business. The issue involves what Professor Davis calls "legislative" rather than "adjudicative" fact. It is the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings.

Judge Leventhal pointed out that the administrative process requires agencies to take significant steps on the basis of forecasts and information that necessarily is not definitive. A leavening factor in that process is the agency's continuing presence in the industry, which enables it to reexamine and make adjustments on the basis of experience. Id.

The FCC analyzed the potential impact of its policy, and was not convinced by AT&T's dire forecasts.^{45/} It retains jurisdiction over the entire industry, however, and can be expected to reexamine its policy and make adjustments if events make that necessary. As the Fourth Circuit said in a recent case involving many of the same parties, "no general principle of administrative law forces all agencies to conduct exhaustive economic impact studies before taking action." North Carolina Utilities Commission v. FCC, No. 76-1002, decided March 22, 1977, slip opinion at 45. The agency plainly may not ignore potential economic impact, the court said; but it would be "anomolous" to permit an illegal carrier-initiated tariff to remain in effect "pending completion of an economic inquiry concerning a presumptively legal FCC regulation." Slip op. at 47.

^{45/} AT&T's economic impact study simply was not very useful. (J.A. 288.) Its forecast was premised on losses of revenue as a result of shifts primarily from MTS to shared and resold WATS and to the discount-rate Telpak service. The Commission exempted WATS from resale and sharing; and, by the time the reconsideration order came out, it was clear that Telpak was not going to be a factor. The Commission, in another docket, had found Telpak unlawful and ordered AT&T to remove it from its tariff. AT&T (Docket No. 18128), 61 FCC 587 (1976), review pending sub nom. MCI Telecommunications Corp. v. FCC, No. 77-1251, D.C. Circuit. AT&T subsequently filed tariff revisions withdrawing its Telpak rates. The Commission's decision in Docket No. 18128 is subject to reconsideration, and timely applications have been filed. But the fact remains that the principal sources of AT&T's predicted revenue loss--shifts to WATS and Telpak--apparently have been avoided. We point out finally that even AT&T's forecast was for revenue losses of \$178.5 million a year--about 0.75 per cent of the company's annual revenues. 60 FCC 2d at 292 n.68 (J.A. 69 n.68).

As that court noted, the Commission has under way, in Docket No. 20003, an inquiry into the economic impact of various policies fostering competition. Slip opinion at 47-48 & n.29. If AT&T can show an impact from resale and sharing that has a detrimental effect on service to the public, Docket No. 20003 could be expanded in scope to permit the showing. It must be assumed that the Commission would not ignore legitimate complaints.

In summary, neither the relevant statutes, nor any case law cited by AT&T, nor the presence of any substantial factual questions required trial-type proceedings in this case. The Commission's notice and comment procedure was adequate.^{46/}

II. THE COMMISSION CORRECTLY DETERMINED THAT RESALE ENTITIES ARE COMMON CARRIERS WITHIN THE MEANING OF THE COMMUNICATIONS ACT, AND REASONABLY EXERCISED ITS DISCRETION IN ESTABLISHING THE REGULATORY SCHEME FOR RESALE AND SHARING.

Although it supports the Commission's resale and sharing policy generally, IBM argues (1) that the Commission erred in concluding that resale entities are common carriers subject to regulation under Title II, and (2) that even if

^{46/} AT&T's complaint about a "vague and general" notice is frivolous. The Commission set forth 12 specific questions in its Notice covering the entire area of its inquiry. ⁴⁷ FCC 2d at 656-67 (J.A. 24-25). No party can reasonably complain of surprise.

resellers are common carriers, the Commission incorrectly assumed that it lacked discretion to impose anything short of full Title II regulation. IBM contends that forbearance from regulating resale entities would better serve the public interest. In direct contradiction to IBM, United System Service, Inc. and Telenet assert not only that the Commission must regulate resellers fully but that it unlawfully abdicated its responsibility to regulate sharing arrangements.^{47/}

A. Resale Entities Are Common Carriers Subject To Regulation Under Title II of the Act.

IBM argues from a combination of statutory definitions that resale entities are not common carriers within the meaning of the Act because they do not engage in transmission. Transmission is essential, the argument goes, because the Act defines wire and radio communications subject to FCC jurisdiction in terms of "transmission" of various types of messages.^{48/} Since resale entities will not "transmit," in IBM's view, they may not be regulated as common carriers. (IBM Br., pp. 14-23). This argument must be rejected both because it

^{47/} Telenet, like IBM, supports the resale and sharing policy except for the part that it challenges in this Court. United takes no position in this Court on issues other than those it has elected to brief.

^{48/} See 47 U.S.C. 153(a), (b), (d), (e), (f), (h).

was not presented in the first instance to the Commission and because it is contrary to law and more than 40 years of regulatory practice at the FCC.

Section 405 of the Communications Act permits parties aggrieved by FCC orders to seek redress first from the Commission by seeking reconsideration. Petitions for reconsideration are not prerequisites to judicial review "except where the party seeking such review . . . relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass." IBM's argument is twice cursed by that statute. Its argument raises questions of fact and of law that the Commission has not considered; and, although IBM sought reconsideration, it did not raise this question in its application. (J.A. 1545).

The novel fact question is whether resellers will transmit within the meaning of the statute. The Commission did not answer that question because it was not asked. The novel legal question is whether transmission is a necessary element of common carriage under the Act. The Commission has never directly answered this question, to counsel's knowledge, because it has not arisen. This situation underscores an important policy reason behind Section 405: Any argument in response to IBM on this issue will be rationalization of Commission counsel because the FCC has not spoken.

This Court has consistently refused to consider arguments presented in violation of Section 405, which is, in effect, a codification of the doctrine of exhaustion of administrative remedies. In Cornell University v. FCC, 427 F.2d 680, 684 (1970), the Court declined to rule on a point in the petitioner's brief because it had "failed to raise this contention before the FCC." In Gross v. FCC, 480 F.2d 1288, 1290 & n.5 (1973), the Court stated:

This bar precluding judicial review of issues that the FCC has not had the initial opportunity to consider is not a mere technicality. It is grounded on sound policy reasons. 49/

See also, e.g., Neckritz v. FCC, 446 F.2d 501, 503 (9th Cir. 1971); Presque Isle TV Co. v. FCC, 387 F.2d 502, 504 (1st Cir. 1967).

The argument is without merit in any event. IBM's sophistic exercise in definitions cannot obscure the fact that the FCC for more than 40 years has regulated common carriers who offer service over facilities owned and operated

49/ In New York State Broadcasters Ass'n v. FCC, 414 F.2d 990, 994 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970), the Court considered an argument that a statute was unconstitutional even though the argument had not been made to the Commission. The Court reasoned that the Commission "either would not or could not" declare an act of Congress unconstitutional. Prior resort to the FCC thus would have been futile.

by others. In fact, Western Union's resale of services and facilities obtained from AT&T began before this Commission was created. Western Union Telegraph Co., 53 FCC 2d 1045 (1975), aff'd sub nom. Western Union Telegraph Co. v. FCC, 541 F.2d 346 (3d Cir. 1976), cert. denied, 429 U.S. 1092 (1977). The international record carriers operate primarily over cables leased from AT&T and satellite facilities and services leased from the Communications Satellite Corp.^{50/} The Commission more recently has applied common carrier regulation to value added carriers, who resell augmented service. E.g., Telenet Communications Corp., 46 FCC 2d 680 (1974).

Ownership of the facilities -or actual transmission-- has never been part of the test for communications common carrier status. See, e.g., National Association of Regulatory

^{50/} AT&T itself obtains some of its telephone circuits on lease from Comsat General Corp., a domestic subsidiary of Comsat Corp. AT&T, 42 FCC 2d 654 (1973). See also Mackay Radio & Telegraph Corp., 6 FCC 562 (1938), where the FCC found that Section 214 authority was required for lease of intercity facilities from another carrier. The Commission said that failure to regulate carriers who lease facilities from others "would open wide the door for nation-wide expansion by a telegraph carrier having little or no physical facilities of its own, without any possible supervision by this Commission and though disastrous competition might result It might or might not be in the public interest, but it is hardly conceivable that Congress intended to permit it unless the Commission should first find that it would be in the public interest." 6 FCC at 573-74.

Utility Commissioners v. FCC, 533 F.2d 601 (D.C. Cir. 1976); National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). Both the courts and the Commission have looked only to whether the entity undertook indifferently to provide communication service to the public for hire, in the ordinary sense of the term. See Frontier Broadcasting Co., 24 FCC 251 (1958); CATV and TV Repeater Services, 26 FCC 403 (1959). Cf. United States v. Southwestern Cable Co., 392 U.S. 157, 169 n.29 (1968).

The Commission analyzed resale carriers in these terms, and found them to be common carriers subject to Title II regulation. 60 FCC 2d 303-08 (J.A. 84-92).^{52/} The agency's consistent interpretation of its own organic statute is entitled to deference. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Court should affirm the common carrier status of resellers.

^{52/} For a more detailed argument on the common carrier status of resellers, see Brief for Intervenor MCI Telecommunications Corp. See also Note, Resale and Sharing of Private Line Communications Services, 61 Va. L. Rev. at 728-45.

B. The Commission's Choice as to How It
Will Regulate Resale and Sharing Was
a Reasonable Exercise of Discretion.

IBM contends that even if resellers are common carriers, the Commission could elect not to regulate them. Because the Commission believed that it had no choice but to impose full Title II regulation, IBM argues, its decision was flawed and the Court should remand to permit the FCC to exercise its discretion. IBM would have the Commission exercise its discretion by declining to regulate. At the other extreme, Telenet and United contend that the Commission abdicated its regulatory responsibility by refusing to regulate sharing arrangements, which, they contend, may perform common carrier activities free of the constraints that bind legitimate carriers.

1. Resale Regulation

IBM's argument rests on an incomplete understanding of the law and of what the Commission did in this case. As to the law, it is plainly wrong to suggest that the Commission could leave resale entities unregulated altogether. The Commission has affirmative commands from Congress to ensure that rates are just, reasonable and nondiscriminatory, Sections 201, 202; that rates and practices are set forth in tariffs filed with the FCC, Section 203; and that carriers obtain certificates of public convenience and necessity before obtaining facilities and putting them in operation, Section 214.

The agency has no authority to ignore these commands, even if market forces arguably are present which undercut the "natural monopoly" justification for regulation. This much is clear from Federal Power Commission v. Texaco, Inc., 417 U.S. 380 (1974), where the Supreme Court held that the FPC lacked the authority to leave natural gas rates entirely to the marketplace in abdication of its statutory responsibility to ensure that rates are just and reasonable.^{53/} See also National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630. The Commission has no discretion whether to regulate common carriers.

The Commission does have discretion in choosing how to regulate, so long as it follows the statutory mandate. IBM appears not to recognize that the FCC consciously exercised its discretion and that its regulatory scheme for resellers is not simply a rigid restatement of Title II. The Commission loosened the entry requirements under Section 214 by requiring a showing only of technical, legal and financial qualification. 60 FCC 2d at 308-12 (J.A. 93-96). It will limit its control over

^{53/} Judge Wilkey of the District of Columbia Circuit, who wrote the opinion that was affirmed in part in Texaco, appeared to agree with the FPC's decision to deregulate small producers as a matter of policy. However, he said, the agency's "imagination and ingenuity here simply outran the statute." Texaco, Inc. v. FPC, 474 F.2d 416, 424 (1972). The Supreme Court, in affirming that part of the court of appeals decision, held that "the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act." 417 U.S. at 397.

exit from the market to those cases where exit would result in actual discontinuance, reduction or impairment of service. 60 FCC 2d at 312-13 (J.A. 98). While it will require tariff filings and ensure that rates are lawful, the Commission will leave ratemaking decisions to the carriers in the first instance. And it will follow its practice, established in other competitive common carrier markets, of "maintaining regulatory flexibility at the outset" to encourage innovation and competitive rates.^{54/} 60 FCC 2d at 313-15 (J.A. 98-100).

In summary, the FCC recognized its discretion within Title II and exercised it to tailor a regulatory scheme for this emerging competitive market. There may be room for disagreement as to details. But the Commission's choice may not be set aside unless it is arbitrary or capricious. See Philadelphia Television Broadcasting Corp. v. FCC, 359 F.2d 282 (D.C. Cir. 1966). IBM's argument that the Commission failed to perceive and exercise its discretion is plainly wrong. IBM does not even argue that the regulatory scheme is arbitrary and capricious.

2. Sharing Regulation

The Commission's discretion is even greater where sharing arrangements are concerned. Having determined, by

^{54/} Southern Pacific Communications Corp., 59 FCC 2d at 1117; American Satellite Corp., 55 FCC 2d at 2-3.

application of the relevant standard, that sharing is not common carriage, the Commission was entitled to leeway in choosing "which regulatory tools will be most effective in advancing the Congressional objective." Philadelphia Television Broadcasting Co., 359 F.2d at 284.

Telenet and United appear to be concerned that sharing arrangements will become sham operations offering service that is indistinguishable from that offered by regulated carriers. But the Commission has forbidden the use of sharing for profit; and it will maintain a watch to ensure that sharing does not "take on a characteristic of common carriage." 60 FCC 2d at 319 (J.A. 106). If it does, the FCC has ample authority, ancillary to its Title ^{II} responsibilities, to impose appropriate regulation. ^{55/} 60 FCC 2d at 320 (J.A. 107).

The petitioners also object that the Commission will have definitional difficulties, and contend that the task of sorting the sharers from the resellers is practically burdensome if not impossible. But these problems are inherent in making distinctions for regulatory purposes. ^{56/} Surely it is no

^{55/} Compare United States v. Southwestern Cable Co., 392 U.S. 157. See also National Ass'n of Regulatory Utility Commissioners, 525 F.2d at 647.

^{56/} For example, see this Court's decision in GTE Service Corp. v. FCC, 474 F.2d 724, where the applicable regulation depends upon whether an entity is a carrier, a data processor, a hybrid carrier, or a hybrid data processor.

more burdensome to make such choices than to regulate unnecessarily the thousands of legitimate sharing arrangements that are likely to result from the FCC's action. The regulatory function often calls for establishing broad guidelines and calling the close ones on a case-by-case basis. The guidelines in this case are reasonable and calculated to achieve the desired aim of distinguishing common carriage subject to regulation from private sharing or joint use of services.^{57/} The Court should affirm this aspect of the decision.

III. AERONAUTICAL RADIO, INC. IS NOT AGGRIEVED BY THE COMMISSION'S DECISION.

Aeronautical Radio, Inc. (ARINC), which operates a shared communications service as an intermediary for the commercial airlines, has filed a 43-page brief that appears to have nothing to do with this case. First, ARINC is not aggrieved by the FCC decision. While it no longer will have a preferred position as a "single customer" exempt from the

^{57/} The petitioners err in assuming that "profit" in itself is the sole criterion for distinguishing resale from sharing. The question in every case is whether there is an indiscriminate undertaking to serve for hire. Profit, the Commission found, is a useful tool for addressing that question because of the "substantial likelihood of an indiscriminate offering to the public once one sharer seeks to engage in a profit-making activity." 60 FCC 2d at 317 (J.A. 102).

general restraints on resale and sharing, 60 FCC 2d at 330-36 (J.A. 127-40), ARINC will be eligible under unlimited resale and sharing to continue to operate precisely as it has in the past. Accordingly, it is not aggrieved by the FCC decision within the meaning of 28 U.S.C. §2344, and it is not a person suffering legal wrong or adversely affected or aggrieved within the meaning of 5 U.S.C. §702. Its petition for review should be dismissed. Cf. Warth v. Seldin, 422 U.S. 490 (1975).

Second, ARINC's complaint appears to be that it may lose the benefit of discount Telpak rates. AT&T has filed tariff revisions eliminating Telpak.^{58/} But the FCC did not require that tariff filing in this case. In another rate case, Docket No. 18128, the Commission found the Telpak rates to be unlawful and required AT&T to eliminate them. AT&T, 61 FCC 2d 587. That decision is subject to reconsideration and is under review in another court.^{59/} Any relief from the termination of Telpak must come in the context of Docket

^{58/} Transmittal No. 12714, filed March 23, 1977. The effective date of the tariff change is June 8, 1977.

^{59/} MCI Telecommunications Corp., No. 77-1251, D.C. Circuit.

No. 18128 or in judicial review of that decision.^{60/} ARINC's aggrievement by loss of Telpak may not be relieved in this proceeding to review the resale and sharing order.

Finally, ARINC's procedural arguments must be unavailing even if it were properly in this Court. The Commission reasonably concluded that the "single customer" exception to the general restriction on resale and sharing was unlawfully discriminatory. Although the analysis focused on Telpak, the Commission's finding was that the general practice of allowing sharing by selected groups while denying it to others was unduly discriminatory. Resolution of this issue in the context of broad rulemaking, even though it first arose in a discrete complaint by the trucking association, was a reasonable exercise of the FCC's discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. §154(j). See Nader v. FCC, 520 FCC 2d at 195-96.

^{60/} Even if the Commission should reconsider its decision in Docket No. 18128, however, and not require the elimination of Telpak, AT&T would be free to initiate rate changes that would eliminate Telpak. 47 U.S.C. §203. See AT&T v. FCC, 487 F.2d 864. Any challenge to such a carrier-initiated change would be through tariff review procedures under Section 204 of the Act.

IV. THE COURT SHOULD NOT STAY THE ORDER BECAUSE THERE IS NO SUBSTANTIAL LIKELIHOOD THAT AT&T WILL SUCCEED ON THE MERITS AND BECAUSE A BALANCE OF COMPETING INTERESTS PENDING LITIGATION DOES NOT FAVOR AT&T.

For reasons stated in the FCC's Opposition to Motion of AT&T for Stay Pending Judicial Review, filed March 17, 1977, the Court should not stay the Commission's order. The FCC relied in part at that time on the fact that the Court could hear and possibly decide the case before the June 21, 1977, effective date of the tariff changes. This remains a possibility. However, we submit that interim relief is unwarranted regardless of whether the Court hears the case before that significant date. The briefs have made even more clear the correctness and lawfulness of the Commission's decision.

CONCLUSION

The Court should affirm the resale and shared use decision in all respects.

Respectfully submitted,

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ADDENDUM
(Relevant Statutes)

47 USC §151

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. June 19, 1934, c. 652, Title I, § 1, 48 Stat. 1064; May 20, 1937, c. 229, § 1, 50 Stat. 189.

47 USC §152(a)

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(c) "Licensee" means the holder of a radio station license granted or continued in force under authority of this chapter.

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(f) "Foreign communication" or "foreign transmission" means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States

(g) "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone.

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 USC §154(j)

Conduct of proceedings; hearings

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

47 USC §201(a)

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

47 USC §202(a)

§ 202. Discriminations and preferences

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practice, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 USC §203

§ 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

47 USC §203 (cont.)

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, § 203, 48 Stat. 1070.

47 USC §204

§ 204. Hearings on new charges; suspension pending hearing; refunds

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

As amended Aug. 4, 1976, Pub.L. 94-376, § 2, 90 Stat. 1080.

47 USC §205

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of \$1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense. June 19, 1934, c. 652, Title II, § 205, 48 Stat. 1072.

47 USC §214 (a)

§ 214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under

47 USC §214(a) (cont.)

section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

47 USC §405

§ 405. Petition for rehearing; procedure; disposition; time of filing; additional evidence

After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(d) (1) of this title, any party thereto, or any other person aggrieved or

whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(d) (1) of this title, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority

47 USC §405 (cont.)

within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order. June 19, 1934, c. 652, Title IV, § 405, 48 Stat. 1095; July 16, 1952, c. 879, § 15, 66 Stat. 720; Sept. 13, 1960, Pub.L. 86-752, § 4(c), 74 Stat. 892; Aug. 31, 1961, Pub.L. 87-192, § 3, 75 Stat. 421.

5 USC §551

§ 551. Definitions

For the purpose of this subchapter—

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(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing:

(5) "rule making" means agency process for formulating, amending, or repealing a rule:

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing:

(7) "adjudication" means agency process for the formulation of an order:

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5 USC §553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States;

or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

- (1) the agency;
- (2) one or more members of the body which comprises the agency; or
- (3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;
- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties;
- (7) dispose of procedural requests or similar matters;
- (8) make or recommend decisions in accordance with section 557 of this title; and
- (9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH	)	
COMPANY, <u>et al.</u> ,	)	
Petitioners,	)	
	)	
v.	)	Nos. 77-4057, <u>et al.</u>
	)	
FEDERAL COMMUNICATIONS COMMISSION	)	
and UNITED STATES OF AMERICA,	)	
Respondents,	)	
	)	
MCI TELECOMMUNICATIONS CORPORATION,	)	
<u>et al.</u> ,	)	
Intervenors.	)	

CERTIFICATE OF SERVICE

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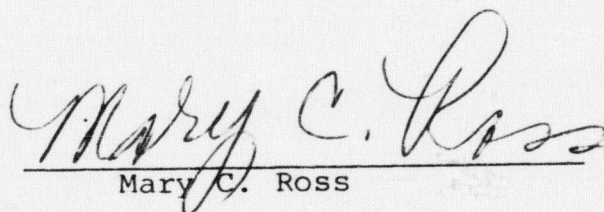
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